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Supreme Court, U.S.
FILED

No. 10-

10-467 OCT 4- 2010

In The
SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

Marc Winkler and Debra Winkler,

Petitioners,

v.

Matthew Grant, both individually and as an employee of Ontario County DSS, Holly Adams, both individually and as an Attorney for Ontario County DSS, Jessica Picchi, both individually and as an employee of Ontario County DSS, Wayne Schoonmaker,Jane Lynch, Robert Kramer, Eileen Tiberio, both individually and as employees of Ontario County DSS, Craig Doran, individually and in official capacity as Justice of the Family Court of Ontario County, New York, Ontario County Department of Social Services,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Marc Winkler
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2. If there is sufficient time to gain judicial authorization in advance of removal, can state agents temporarily remove a child under (alleged) emergency circumstances without first gaining judicial authorization? *Circuit split.*

3. Is "probable cause" or a different standard of proof the appropriate standard for judicial authorization for removal of a child from the parents care and custody, exigent or otherwise? *Circuit split.*

4. Can there be "imminent" danger when Winkler was not present and Debra drove RW 3.5 hours to be seized by Grant and Picci?

5. Was *Erickson v. Pardus*, 127 S.Ct. 2197, (2007) followed properly in the courts below as applied to Winkler?

6. Does the New York State Department of Social Services, prior to (and during) placement of a child in foster care, attempt to eliminate the need for removing the child, as mandated by Federal and State laws?

7. Does. *Ex. Parte Young* 209 US 123, 159-160 [1908] allow injunctive relief claimed against a state judicial officer in his official capacity be applied to the State?

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OPINIONS BELOW

The unpublished Second Circuit Court of Appeals order in *Winkler v. Grant*, No. 08-2301-cv, is in Appendix A and the order denying rehearing *en banc* is in Appendix B. The unpublished order of the United States District Court for the Western District of New York, 07-CV-6280T, is in Appendix C. All orders issued without the benefit of oral argument or discovery.

JURISDICTION

On April 8th, 2008, the District Court for the Western District of New York ruled that Winkler failed to state a claim that his due process rights had been violated by the removal of his three-day-old infant by Grant and Picchi. On March 18th, 2010 and on the July 6th, 2010 motion to reconsider, The United States Court of Appeals for the Second Circuit denied Winkler's appeal. The District Court had jurisdiction pursuant to United States Constitution Article III §2, 42 U.S. Code §1983, 28 U.S. Code §1343, 28 U.S. Code §1331 and 42 U.S. Code §1985. The Court of Appeals had jurisdiction pursuant to 28 U.S. Code §1291 and 28 U.S. Code §1294. The jurisdiction of this Court is invoked under 28 U.S.Code §1254(1)

STATUTORY PROVISIONS

Fourth Amendment - The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment - No person shall be held to answer for any capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, Section 1 - All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

RW was in Jamestown, New York, over 150 miles and 3.5 hours away when Grant and Picchi "ordered" Debra to bring RW back to Canandaigua, NY for "inspection". Instead, Grant and Picchi seized RW. Debra compiled under threat of "We will get a warrant", fearing the safety of the other four children, at the time in abusive foster care with Linda and James Burroughs. Entrapment was used to produce child so Defendants Grant and Picchi could seize RW. Debra Winkler was told this was a normal visit with AW, MW, BW and IW; all the caseworkers wanted to do was "inspect" RW. However, instead of "inspection", Defendants Grant and Picchi, seized newborn RW. During the time that Debra Winkler was transporting RW a proper order of the Ontario County Family Court could have been obtained. The place of the seizure of RW is easily within walking distance of the Courthouse.

Marc Winkler had not seen RW for close to 24 hours. There was no "imminent" threat to RW. The only plausible 'imminent' threat would have been Debra Winkler and the DSS deemed it mandatory that she transport RW for over 3 hours, militating against a finding that Debra Winkler was an imminent threat to RW. Had there been a true emergency, Chautauqua County authorities could have intervened *and seized the* child immediately, rather than Grant and Picchi 3.5 hours later. Additionally, Grant and Picchi made the decision to seize RW the evening before, but failed to take any action to remove RW for the alleged exigency until the next day. Almost 24 hours had elapsed before seizure.

[Seizures] conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello v. United States*, 269 U.S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police [and DSS]. . . ." *Wong Sun v. United States*, 371 U.S. 471, 481 -482. "Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes," *United States v. Jeffers*, 342 U.S. 48, 51 , and that [seizures] conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967), affirmed *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) This insistence upon interposing a "neutral and detached magistrate" between the state and the citizenry, subject to a few exceptions justified only by "exceptional circumstances," *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), has become a "cardinal principle" of Fourth Amendment jurisprudence. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978). The government bears the burden of proving exigency. *United States v. Wicks*, 995 F.2d 964, 970 (10th Cir.1993). This exception is narrow, and must be "jealously and carefully drawn." *Arkansas v. Sanders*, 442 U.S. 753,759, 99 S. Ct. 2586 (1979).The existence of exigent circumstances is a mixed question of law and fact. *United States v. Anderson*, 981 F.2d 1560, 1567. *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (right to notice and meaningful opportunity to be heard are "core of due process"); see also *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (pre-deprivation hearing is

"root requirement" of due process). *Burden of Proof Begone* Chill (2004) http://lsr.nellco.org/uconn wps/55

REASONS FOR GRANTING THE WRIT

1. CERTIORARI REVIEW IS NECESSARY TO RESOLVE THE CONFLICTS BETWEEN THE CIRCUITS, TO CARRY OUT THE INTENT OF CONGRESS AND TO DO JUSTICE IN THIS CASE.

In *Tenenbaum v. Williams,* 193 F.3d 581 (2nd Cir., 1999), the Second Circuit held regarding parents' procedural due process rights:

[I]t is unconstitutional for state officials to effect a child's removal on an "emergency" basis where there is reasonable time safely to obtain judicial authorization consistent with the child's safety.

In *Doe v. Kearney,* 329 F.3d 1286 (11th Cir. 2003), the Eleventh Circuit held that whether an emergency removal comports with due process does not hinge solely on whether there was time to obtain judicial authorization, but on a variety of relevant factors presented in the case. Also see *Rogers v. County of San Joaquin.*, 487 F.3d 1288, (9th Cir. 2007) *Rodgers* is very similar to the Winkler case and is consistent with *Tenenbaum, supra.* In *Rodgers*, the 9th Circuit held that the social worker's allegations of exigency were misplaced and reversed the lower court.

In *Roska v. Peterson* 304 F.3d 982 (10th Cir. 2002),

The Tenth Circuit cited the Second Circuit stating that the "mere possibility" of danger is not enough to justify a removal without appropriate process and that "the exigency exception is narrow, and must be "jealously and carefully drawn." *Simply put, unless the child is in imminent danger, there is no reason that it is impracticable to obtain a warrant before social workers remove a child[.]* (emphasis added) *Roska, supra.* See also *Mabe v. San Bernardino County, Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 and *Brokaw v. Mercer County*, 235 F.3d at 1020

The lower courts should not have made conclusions of law that due process was served with a post-deprivation hearing, as it is necessarily a fact intensive inquiry as to what process is due. It is for the jury to determine if an emergency existed.

The allegations in my complaint were sufficient to overcome *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). I alleged facts (uncontroverted on the record) to show that there could not have been emergency when Debra had to drive RW over 3 hours and over 150 miles to meet DSS demands, and I wasn't present. *This is clearly adequate pleading within current Supreme Court precedent.* No lower court has addressed these facts.

> Power is a heady thing, and history shows that the [DSS] acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the [DSS] before they [seize a child]. We cannot be true to that constitutional requirement and excuse the absence of a [] warrant

> without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative. *Mcdonald v. United States*, 335 U. S. 451 (1948)

I should not have the burden of pleading around an exception to the Fourth Amendment. A warrantless seizure is presumptively unconstitutional and Defendants have the burden to plead and prove that their intrusion falls within an exception to the warrant requirement. The case should not have been dismissed at the 12(b)(6) stage. It should have sufficed to say that there was no emergency. I should not (indeed, cannot) have to prove a negative. The Ontario County Department of Social Services should be required to prove that *there was an actual emergency requiring seizure of RW.*

2. CERTIORARI REVIEW IS NECESSARY TO CARRY OUT THE INTENT OF CONGRESS AND TO DO JUSTICE IN THIS CASE REGARDING PRO SE LITIGANTS

As per *Erickson v. Pardus, 127 S.Ct. 2197, (2007)*, I should have been granted leniency as well as skepticism of the Honorable Courts for a 12(b)(6) dismissal on a civil rights case, especially where there is a clear "on all fours" precedent in the Circuit (*Tenenbaum, supra)*, that is directly applicable.

In *Erickson*, this Honorable Court reversed, where both the district court and the 10th Circuit threw out the case, holding that Erikson's pleadings only included *"conclusory allegations to the effect that he has suffered a cognizable independent harm..."* So

too here, I was not heard in the District or Second Circuit *and dismissed for the same reasons* as in *Erickson. id.*

> [W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp., supra.* (citations omitted)

It appears that in Winkler's case, the lower courts stuck to the notion of deny, deny, deny, regarding Pro-Se litigants. I have proven there *could not have been an emergency* and I was unfairly dismissed at all stages by the lower courts *without even an opportunity to be heard.*

> A document filed pro se is "to be liberally construed," *Estelle*, 429 U. S., at 106, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). Cf. *Fed. Rule Civ. Proc. 8(f)* ("All pleadings shall be so construed as to do substantial justice"). *Erickson, supra.*

3. CERTIORARI REVIEW IS NECESSARY TO REVIEW THE OPERATIONS OF THE DSS IN NEW YORK.

N.Y.S. F.C.A. §1022 ensures that there will be judicial oversight of overzealous caseworkers, in order to prevent unwarranted removals. An emergency removal where a court order could be obtained, contravenes statute. The comment to the predecessor statute to §1022 stated, "This section

and section 323 are designed to avoid a premature removal of a child from his home by establishing a procedure for an early judicial determination of urgent need" (*Committee Comments, McKinney's Cons Laws of NY, Book 29A, Family Ct Act §322* [1963 ed]). Except, in Winkler's case, this provision of law was ignored by the DSS when they seized RW.

Post-deprivation substantive due process and pre-deprivation procedural due process were not comported with. Defendants' own statistics from their website show that in Western New York, especially Ontario County, kinship foster care is not followed. As per *N.Y.S. F.C.A. §1022, §1024, N.Y.S. S.S.L. §384-b, 22 NYCRR 430.10* and *Federal 42 U.S. Code 671*, Defendants were required to seek family foster care *first*, prior to removal. In the instant case, this was not done. Statistically, in Western New York, family foster care is not used, in violation of law. New York State Assembly report *Losing Our Children,An Examination of New York's Foster Care System, NYS Assembly, 1999.* Winkler had preapproved kinship foster care available with the maternal grandmother, but this was denied by the DSS, so that they would have control in court.

Statistics in the brief and on the district court record show that there is a disparity in use of kinship foster care in Western New York. In New York City, there is approximately 30% family foster care. In Western New York, it is 4%. That 4% is *not* in Ontario County, it is mostly the large cities, Buffalo, Rochester and Syracuse. *There is no family foster care in Ontario County*, contravening legislative intent. Parents in New York are affected by this

every day by the DSS refusing family foster care. Most people are so drained by the terror that is DSS, that if this Honorable Court does not review the lack of kinship foster care in Western NY and the lack of due process, these clear Constitutional violations will continue to escape meaningful judicial review.

4. CERTIORARI REVIEW IS NECESSARY TO REVIEW THE DECISION OF THE LOWER COURTS REGARDING EX PARTE YOUNG

Regarding Defendant Doran, the wrong conclusion was reached by the Honorable Courts below. *Ex. Parte Young* 209 US 123, 159-160 [1908] allows injunctive relief claimed against a state officer to be applied to the State. Since Plaintiff is not suing Judge Doran for money, the 11th Amendment is no bar.

CONCLUSION

> The Constitution recognizes higher values than speed and efficiency. *Stanley v. Illinois*, 405 U.S. at 656, 92 S.Ct. 1208. **And as this case may demonstrate, if officers of the State come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is inevitable that they will eventually inflict harm on the parents, the State, and the child.** *Tenenbaum.*

This case is important to me, personally, to teach my children that even officials of the state must follow the laws that we all have agreed to live by. I only ask for the same consideration to prove that there

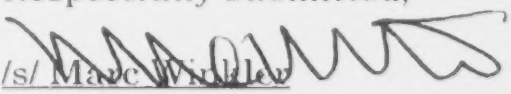
was no emergency as the Second Circuit explained in *Southerland v. Giuliani*, No. 00-7410 (2d Cir., 1999):

> [A] state actor may not deprive a parent of the custody of his children without a pre-deprivation hearing unless the children are "immediately threatened with harm[.]" *Tenenbaum*, We think that Southerland should be given an opportunity to prove [] that no emergency justified the seizure of his children without a hearing[.]

This Honorable Court should intervene in this case to settle the circuit splits and to do justice in this case. Since a warrantless seizure is presumptively unconstitutional, Winkler should not have the burden of pleading around an exception to the Fourth Amendment. Defendants have the burden to prove that their intrusion falls within an exception to the warrant requirement. For the foregoing reasons, Petitioner respectfully requests that this Honorable Court grant the petition for a Writ of Certiorari. In the alternative, I respectfully ask this Honorable Court for a summary disposition on the merits, so that I may be heard as in *Southerland*.

Dated: October 2nd, 2010

Respectfully submitted,



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I declare under penalty of perjury that the foregoing is true and correct. Executed on October 2nd,2010

APPENDIX A

SUMMARY ORDER

United States Court of Appeals for the Second Circuit, *Winkler v. Grant*, No. 08-2301-cv, Ralph K. Winter, Debra Ann Livingston, Circuit Judges. Lewis A. Kaplan, District Judge.

Appellant Marc Winkler, *pro se*, appeals the district court's orders dismissing his 42 U.S.C. § 1983 claims and denying his motions for reconsideration and to seal the case. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

This Court reviews *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6), construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *See* Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002). "To survive a motion to dismiss, a complaint must plead 'enough facts to state a claim for relief that is plausible on its face.'" Ruotolo v. City of New York, 514 F.3d 184, 188 (2d Cir.2008) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Although all allegations contained in the complaint are assumed to be true, this tenet "is inapplicable to legal conclusions." Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content

that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Turkmen v. Ashcroft, 589 F.3d 542, 546 (2d Cir. 2009) (quoting Iqbal, 129 S. Ct. at 1949) (internal quotation marks omitted). Meanwhile, we review a district court's decisions regarding Rule 59(e) and Rule 60(b) motions for abuse of discretion. *See* Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 729 (2d Cir. 1998) (Rule 60(b)); Baker v. Dorfman, 239 F.3d 415, 422 (2d Cir. 2000) (Rule 59(e)). Here, an independent review of the record and relevant case law reveals that the district court properly dismissed Winkler's claims and denied reconsideration of that dismissal. Except as noted below, we affirm for substantially the same reasons stated by the district court in its thorough April 8, 2008 and August 12, 2008 orders.

To the extent that Winkler sought injunctive relief in his 42 U.S.C. § 1983 claims against Defendant Doran, we note that § 1983, as amended in 1996, provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983. Because Winkler did not allege that a declaratory decree was violated or that declaratory relief was unavailable, his complaint failed to state a claim upon which relief could be granted.

With respect to Winkler's due process claims based on the removal of his newborn child by the Department of Social Services, we note that, in *Tenenbaum v. Williams,* this Court held that a

parent and child may state a procedural due process claim based on an emergency removal without pre-deprivation judicial authorization if, based on the facts, a "properly instructed jury could conclude that at the time the caseworkers decided to remove [the child], there was reasonably sufficient time, entirely consistent with [the child's] safety, to seek a court order," since "[i]f there was reasonably sufficient time, there was no emergency." 193 F.3d 581, 595 (2d Cir. 1999). This Court further held that while the parents and child in *Tenenbaum* had a substantive due process claim to remain together without the coercive influence of the state, their substantive due process rights were not violated because the temporary separation, in an effort to obtain assurance that the child had not been abused, was not "so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it." Id. at 600.

Here, the district court properly concluded that Winkler failed to state a claim that his due process rights had been violated by the removal of his three-day-old infant. Winkler correctly points out that the district court erred in finding that R.W. was removed on June 9, 2004, since he alleged in his complaint that the infant was removed on June 8. Nonetheless, Winkler's complaint failed to state a plausible claim for relief, in that it contained only a conclusory allegation that exigent circumstances were not present when the child was removed, which the district court was not obligated to credit. Mills, 572 F.3d 66, 72.

Finally, we note that Winkler challenges the district court's denial of his requests that the portions of the

record containing his minor children's names be sealed or redacted to protect their privacy. This Court reviews a district court's decision on whether to order the sealing of a record for abuse of discretion. *See* DiRussa v. Dean Witter Reynolds, Inc., 121 F.3d 818, 826 (2d Cir. 1997). Federal Rule of Civil Procedure 5.2(a) provides that: "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains . . . the name of an individual known to be minor . . . a party or nonparty making the filing may include only: . . . (3) the minor's initials."

The record currently includes a few exhibits listing the children's names in unredacted form, and numerous other exhibits where the names are not sufficiently redacted to prevent a reader from discerning them. In denying Winkler's motion to seal, the district court appears to have overlooked those instances where the children's names appear in unredacted or otherwise still legible form. We therefore vacate the district court's denial of Winkler's motion to seal the case, so that the court may take appropriate action to protect the identities of minors currently named in the record.

We have considered all of Winkler's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment and order of the district court, with the exception of the district court's denial of Winkler's most recent motion to seal the case, which is VACATED and REMANDED for further proceedings consistent with this order.

FOR THE COURT: Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 6th day of July, two thousand ten.

MARC WINKLER,

Plaintiff-Appellant,

v. Docket No. 08-2301-cv

UNITED STATES COURT OF APPEALS SECOND CIRCUIT FILED JUL -6 2010 Catherine O'Hagan Wolfe, Clerk

MATTHEW GRANT, et al.

Defendants-Appellees.

Marc Winkler having filed a petition for panel rehearing, or, in the alternative, for rehearing en banc, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing en banc, IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:Catherine O'Hagan Wolfe, Clerk
S/Catherine O'Hagan Wolfe

APPENDIX C

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK WINKLER v. GRANT 07-CV-6280T

INTRODUCTION

Plaintiff Marc Winkler, ("Winkler") proceeding pro se, brings this action pursuant to 42 U.S.C. § 1983 and various federal laws claiming that the defendants violated his federal constitutional and statutory rights with respect to a New York State custody proceeding involving his minor children. Specifically, Winkler contends that his children were unlawfully removed from his home and placed in foster care in violation of his civil rights. Pending before the court are five motions including: (1) defendant Craig Doran's motion to dismiss (docket item no. 17); (2) the remaining defendants' motion to dismiss, or, in the alternative for summary judgment (docket item no. 13); (3) plaintiff's motion "to supplement jurisdiction over plaintiff's state law claims); (4) plaintiff's cross-motion for summary judgment; and (5) defendants' motion to strike.

For the reasons set forth below, I grant defendant Doran's motion to dismiss, grant the remaining defendants' motion to dismiss, deny plaintiff'motions, and deny as moot defendants' motion to strike.

DISCUSSION

Plaintiff claims that in 2003, the defendants violated his due process rights by unlawfully temporarily removing four of his children from his custody and

intentionally and maliciously delaying custody proceedings following the removal of his children from his home. He further contends that in 2004, the defendants violated his constitutional rights in connection with the temporary removal of a fifth child, a 3-day old newborn, from his home.

I. Legal Standards for evaluating Motions to Dismiss and for Summary Judgment

The defendants move to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure claiming that plaintiff has failed to state a claim upon which relief can be granted. When evaluating a Rule 12(b)(6) motion, the court must ascertain, after presuming all factual allegations in the pleading to be true and viewing them in the light most favorable to the plaintiff, whether or not the plaintiff has stated any valid ground for relief. Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993), cert. denied 513 U.S. 1014 (1994). The court may grant a Rule 12(b)(6) motion only where "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir. 1991) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "This rule applies with particular force where the plaintiff alleges civil rights violations or where the complaint is submitted *pro se*." Chance v. Armstrong, 143 F.3d 698, 701 (2d Cir. 1998).

With respect to defendants' motion for summary judgment, Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall

be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." When considering a motion for summary judgment, all inferences and ambiguities must be resolved in favor of the party against whom summary judgment is sought. R.B. Ventures, Ltd. v. Shane, 112 F.3d 54 (2nd Cir. 1997). If, after considering the evidence in the light most favorable to the nonmoving party, the court finds that no rational jury could find in favor of that party, a grant of summary judgment is appropriate. Annis v. County of Westchester, 136 F.3d 239, 247 (2nd Cir. 1998).

II. Defendant Doran's Motion to dismiss.

Defendant Craig Doran, a Family Court Justice in the Ontario County, New York, Family Court, moves to dismiss plaintiff's Complaint against him on grounds that he is entitled to absolute immunity because the acts that he took which are complained of by the plaintiff were judicial acts undertaken in his capacity as a Family Court judge. It is well settled that judges are absolutely immune from suit for any actions taken within the scope of their judicial responsibilities. See, e.g., Mireles v. Waco, 502 U.S. 9 (1991). The protection of immunity is not pierced by allegations that the judge acted in bad faith or with malice. Pierson v. Ray, 386 U.S. 547, 554 (1967). The United States Supreme Court has expressly applied the doctrine of judicial immunity to actions brought pursuant to 42 U.S.C. § 1983. See

Pierson, 386 U.S. At 547. The Supreme Court has developed a two-part test for determining whether or not a judge is entitled to absolute immunity. Stump v. Sparkman, 435 U.S. 349, 356-57 (1978). First, "[a] judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'" Id. At 356-57 (quoting Bradley, 80 U.S. (13 Wall.) at 351 (1871)). Second, a judge is immune only for actions performed in his judicial capacity. Id. at 360; see also Maestri v. Jutkofsky, 860 F.2d 50 (2d Cir. 1988); Gregory v. Thompson, 500 F.2d 59, 62 (9th Cir. 1974).

In this case, there is no dispute that Judge Doran had jurisdiction to hear the removal petition before him, and the acts complained of by the plaintiff involved actions that Judge Doran took in his judicial capacity. Accordingly, Judge Doran is entitled to dismissal of the claims against him with prejudice.

To the extent that plaintiff's claim is made against Judge Doran in his official capacity as a New York State Family Court Judge, such a claim seeking recovery against the State of New York is barred by the Eleventh Amendment, because the State of New York has not consented to such a suit in federal court. See Will v. Michigan Department of State Police, 492 U.S. 58, 70 (1989) (Eleventh Amendment bars suits in federal court brought against States for damages where State has not waived its immunity from such an action.)

III. Remaining Defendants' Motion for Summary Judgment

According to the uncontroverted evidence contained in the record, on December 3, 2003, plaintiff and his wife were arrested on charges of First Degree Reckless Endangerment following an investigation by defendant Matthew Grant (a caseworker with the Ontario County Department off Social Services) which revealed that the plaintiff, his wife, and their four children were living in extremely unsanitary conditions in the plaintiff's residence. The children were removed from the plaintiff and his wife on December 3, 2003, and several court proceedings to determine custody were held before the Honorable Craig Doran during the month of December, 2003. On May 10, 2004, Winkler consented to a finding of neglect with respect to the care of his four children.

Plaintiff filed the Complaint in this action on June 4, 2007, approximately three and a half years after the date on which his children were taken from his custody, and approximately 3 years and one month after he consented to a finding of neglect in Ontario County, New York, Family Court.

The statute of limitations for actions brought pursuant to 42 U.S.C. § 1983 in New York State is the three-year period provided for in New York's CPLR § 214(2). Owens v. Okure, 488 U.S. 235, 251(1989); Jewell v. County of Nassau, 917 F.2d 738, 740 (2d Cir. 1990). The three-year period begins on the date on which the plaintiff knew or had reason to know of the injury allegedly suffered. Baez v.

Kahanowicz, 469 F.Supp.2d 171, 176 (S.D.N.Y., 2007). In the instant case, plaintiff's cause of action for the unlawful removal of his children accrued on December 3, 2003, the date on which his children were taken. Because the removal of his children took place more than three years before plaintiff filed his Complaint, plaintiff's cause of action based on that claim is time barred. His cause of action for the continued detention of his children accrued in December, 2003, when several hearings were held on the issue of the custody of his children, or, at the very latest, on May 9, 2004, when he consented to a finding of neglect.

In either case, those acts occurred more than three years prior to the filing of plaintiff's complaint, and accordingly, those claims are time-barred as well. See e.g., Eidson v. State of Tennessee Department of Children's Services, 510 F.3d 631 (6th Cir., 2007) (dismissing as untimely § 1983 action brought by father of children who had been involuntarily removed from his home). In sum, all of plaintiff's claims regarding the removal and continued detention of his four children identified as "A.W.", "M.W.", "B.W.", and "I.W." are dismissed with prejudice as untimely.

With respect to plaintiff's claim that the removal of his newborn child (identified in the Complaint as "R.W.") was unlawful, and that he was denied due process in connection with the removal of his child, I find that plaintiff has failed to state a claim for the unlawful removal of his child or violation of his right to due process. While it is true that the parent-child relationship "'gives rise to a liberty interest that a

parent may not be deprived of absent due process of law'", Smith v. Williams-Ash, F.3d , 2008 WL 782453, *2 (6th Cir., March 26, 2008)(quoting Kottmyer v. Mass, 436 F.3d 684, 689 (6th Cir. 2006) (See also Kia P. v. McIntyre, 235 F.3d 749, 758 (2nd Cir., 2000) in the instant case, the record reveals that Winkler was afforded due process of law in connection with the temporary removal of the infant R.W. from his home. See Eidson, 510 F.3d at 635 (temporary deprivation of custody of a child violates due process only if deprivation is not accompanied by a hearing within a "reasonable time"); Kia P., 235 F.3d at 760 (upon removal of a child from parental custody, State has the "duty to initiate a 'prompt' post-deprivation hearing" to determine future custody). The record demonstrates that R.W. was removed from the Winkler home on June 9, 2004, after police responded to a domestic dispute at the Winkler residence.

A court hearing was scheduled for June 10, 2004, and at that time, the parties consented to a return of the infant to her mother, and the infant was returned on June 10, 2004, one day after the infant was removed on an emergency basis. Because a judicial hearing to determine whether or not the infant R.W. should be returned to her home was scheduled within 24 hours of the time R.W. was removed from the Winkler Residence, the requirements of due process were satisfied. See Taylor v. Evans, 72 F.Supp.2d 298, 306-307 (S.D.N.Y., 1999)(hearing held within four days of emergency removal of child from parent's custody comported with due process); Hollenbeck v. Boivert, 330 F.Supp.2d 324 (S.D.N.Y., 2004)(hearing

held within three days after removal of child from parental custody, and return of child within three weeks did not violate parent's right to due process). See also, Southerland v. City of New York, 521 F.Supp.2d 218, 232 (E.D.N.Y., 2007)(temporary removal of children from parental custody pending hearing held within reasonable time generally does not state a claim for violation of right to due process). Accordingly, plaintiff's claims that his civil rights were violated with respect to the removal of his infant child R.W. from his home are without merit, and his Complaint is dismissed with prejudice.

CONCLUSION

For the reasons set forth above, defendants' motions to dismiss are granted, and plaintiff's Complaint is dismissed in its entirety with prejudice. Plaintiff's motions to supplement and for summary judgment are denied. Defendants' motion to strike is denied as moot. Further, the Court hereby certifies, pursuant to 28 U.S.C. § 1915(a)(3), that any appeal from this Order would not be taken in good faith, and leave to appeal to the Court of Appeals as a poor person is denied. Coppedge v. United States, 369 U.S. 438 (1962). Any request to proceed on appeal as a poor person should be directed, on motion, to the United States Court of Appeals for the Second Circuit, in accordance with Rule 24 of the Federal Rules of Appellate Procedure.

ALL OF THE ABOVE IS SO ORDERED.
S/ Michael A. Telesca
MICHAEL A. TELESCA
United States District Judge Dated: April 8, 2008